

Calvin D. Johnson Nursing Home and Theresa Mueller and Shirley Johnson. Cases 14-CA-15005-2 and 14-CA-15005-4

2 August 1983

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 3 March 1983 Administrative Law Judge Martin J. Linsky issued the attached Supplemental Decision in this proceeding.¹ Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Calvin D. Johnson Nursing Home, Belleville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ The Board's Decision and Order is reported at 261 NLRB 289 (1982).

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, Respondent asserts that the Administrative Law Judge's credibility findings are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

³ Member Hunter, in adopting the Administrative Law Judge's reliance on *Woonsocket Health Centre*, 263 NLRB 1367 (1982), notes that the Administrative Law Judge cited that case for the limited proposition that a discriminatee's quitting an interim job to care for a child for a while does not constitute permanent withdrawal from the labor market which would terminate a respondent's liability for any further backpay. Member Hunter therefore finds it unnecessary here to express a position with regard to any other aspects of the Board's decision in that case.

⁴ The General Counsel excepts to the Administrative Law Judge's failure to include Respondent's officers, agents, successors, and assigns, in his recommended Order. We shall include such language in our Order.

SUPPLEMENTAL DECISION

MARTIN J. LINSKY, Administrative Law Judge: In a backpay specification, dated August 31, 1982, the Regional Director for Region 14 alleged that the Respondent, Calvin D. Johnson Nursing Home, had failed to pay backpay due under the Order of the National Labor Relations Board, dated April 23, 1982. A hearing was held on November 18, 1982, in St. Louis, Missouri, before me.

I. JURISDICTION

The Respondent, Calvin D. Johnson Nursing Home, appeared by counsel, for the proceedings, conducted on November 18, 1982, in St. Louis, in accordance with the notice of hearing which was joined with the backpay specification issued by the Regional Director for Region 14 on August 31, 1982. Following the hearing, the General Counsel and the Respondent filed briefs, which have been considered.

II. BACKGROUND

On April 23, 1982, the Board found that the Respondent had committed an unfair labor practice by discharging Mary Deen, Shirley Johnson, and Theresa Mueller, all of whom were nurses aides, because they had engaged in protected concerted activity, and ordered their reinstatement with backpay. The Respondent failed to comply with the Board's Order, therefore, on August 31, 1982, the Regional Director for Region 14 issued the backpay specification and notice of hearing which is the subject of this proceeding. Prior to the commencement of this hearing, Mary Deen accepted an amount satisfactory to herself and the Region from the Respondent, and is not a party to this hearing. The backpay period began on May 22, 1981, and ended for Shirley Johnson on May 27, 1982, and for Theresa Mueller on May 24, 1982.

III. ISSUES

The only issue in this case is the amount of backpay to which Theresa Mueller and Shirley Johnson are entitled under the Board's Order of April 23, 1982, in Case 14-CA-15005.

Counsel for the General Counsel contends that the proper measure of backpay due to Mueller and Johnson in order to make each whole is the amount set forth in the backpay specification.

Counsel for the Respondent contends that the amount set forth in backpay specification should be reduced to zero because of the willful failure of Mueller and Johnson to seek employment and thereby mitigate backpay damages. Respondent also argues that Johnson, if entitled to any backpay at all, should only be entitled to wages for part-time employment since she had allegedly requested a change to a part-time schedule before she was illegally discharged.

Findings and Conclusions

There is no dispute as to the wage rate each of the discriminatees would have received if each had continued to work for the Respondent.

The compliance officer, Roy Hayden, expertly explained the figures used in determining the amount to which the discriminatees are entitled. He excluded those periods when they were not available for work because of personal or family illness, and enrollment in school.

Counsel for the Respondent argues that Mueller and Johnson failed to reasonably seek interim employment and should be considered to have been unavailable for work. On this point the Respondent has failed to meet his burden of proof. Board cases have clearly stated the requirement to prove failure to mitigate damages in a backpay case. The employer must prove that a discriminatee unjustifiably refused to take desirable new employment. *Aircraft and Helicopter Leasing and Sales*, 227 NLRB 644, 646 (1976). See also *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 199-200 (1941), and *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966). The Board and the courts have also repeatedly said that this burden of proof is not met by failure to successfully obtain interim employment or low interim earnings. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966); *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A discriminatee must make a reasonable effort to mitigate her loss of income but is not held to the highest standard of diligence. *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 422-423 (5th Cir. 1968). And in determining the reasonableness of this effort, the employees' skills and qualifications [her] age, and the labor conditions in the area are factors to be considered. *Mastro Plastics Corp.*, 136 NLRB 1342 (1962). The Board has held that in determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes the employee diligently sought other employment during the entire backpay period. *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395 (1972); *Neely's Car Clinic*, 255 NLRB 1420 (1981). On this record it has been established that both Johnson and Mueller made reasonable searches for work during the entire backpay period and are therefore entitled to the amount set forth in the backpay specification.

I credit the testimony of Theresa Mueller in its entirety and conclude that she acted reasonably in seeking interim employment. She registered with an employment service on July 23, 1981. In addition, prior to starting work at Four Fountains Nursing Home on September 3, 1981, Mueller called two other nursing homes seeking employment.

She terminated her employment at Four Fountains Nursing Home in order to be home to look after her young son who for the first time in his life was being taken off medicine for his heart. The compliance officer properly deducted that time she was home with her son as being a period of time she was unavailable for employment. The Respondent argues that Mueller should have requested a leave of absence from Four Fountains rather than quitting her job and alleges that her failure to request a leave of absence was a failure to mitigate damages. Mueller credibly testified that she in good faith did not believe a leave of absence would ever be granted to a nurses aide but only to professionals like nurses. Further there is no evidence that Four Fountains would

have granted her a leave of absence even if she had requested one. Accordingly, her quitting her job was justified and should not reduce the backpay liability of the Respondent. *Woodsocket Health Centre*, 263 NLRB 1367 (1982). The compliance officer deducted the money Mueller was paid for her job at Four Fountains.

In January 1982, Mueller applied for a job at Bert's Chuck Wagon in Millstadt and following her move later that month from Millstadt to Cahokia, Illinois, she sought employment as a waitress in no less than eight different restaurants. These efforts did not meet with success.

On March 29, 1982, Mueller began training to become a licensed practical nurse and was not available for employment. She did not accept the Respondent's offer of reinstatement because she was still a full-time student.

Any earnings from Mueller's second job at the trailer court where she and her husband lived and served as managers would not, of course, limit in any way the Respondent's backpay liability. This was a second job that Mueller shared with her husband. She had this second job from 1979 to January 1982 when she and her husband separated and Mueller moved to Cahokia. Income from a second job will not limit backpay liability of a wrongdoer. *S.E. Nichols of Ohio*, 258 NLRB 1, 15 (1981).

I similarly credit the testimony of Shirley Johnson. Johnson did less than Mueller did with regard to seeking interim employment following her illegal discharge but I find, considering all the circumstances, that Johnson acted reasonably to mitigate damages. A young single parent of two children, age 5 and 8 years at the time she was illegally discharged, Johnson was unable to look for work because of incredibly dire economic circumstances. Rather than apply for unemployment compensation when discharged, Johnson applied for welfare in order to get medical coverage for her children. She was without funds to hire a babysitter, so she could look for a job. She was unable to pay for needed repair work on her car and therefore was not able to drive in search of work. In June 1981 her telephone was cut off. In the fourth quarter of 1981 after her mother had moved in with her Johnson applied for a position with Allied Medical Laboratories as a blood drawer. She did not get the job. She also applied in that same time frame to return to work as a receptionist for an attorney named Wilson Gray. Before she could follow up on that she developed an eye infection which required surgery. By the time she was able to go to work for attorney Gray he had filled the position. Johnson's other attempts to find employment consisted of letting family and friends know she needed a job and following her surgery she called two different hospitals, St. Mary's and Community, seeking employment without success.

Counsel for the Respondent argues that Johnson had requested a schedule change to part time every other weekend before she was discharged and should be entitled to backpay only at part-time rates. The testimony concerning this request established only that a request may have been made. There was a dispute over how many hours part-time duty would have entailed. Barbara Wirth testified that the only part-time schedule available

was 8 hours a week. It was clear from Johnson's testimony that she never intended to reduce her schedule to 8 hours a week. I credit Johnson's testimony at the hearing that she did not even remember asking for a change in hours. "It is also well established that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966); *Southern Household Products Co.*, 203 NLRB 881 (1973). In any event the question of part-time work is speculative because it had not

been granted by the Respondent or accepted by Johnson. Johnson's backpay award, computed using the average number of hours worked in the quarter immediately before her discharge, was therefore a proper computation. It is also noted that when Johnson was reinstated in May 1982, she was reinstated as a full-time employee.

As alleged in the backpay specification, the computation of Shirley Johnson's gross and net backpay by calendar quarter is as follows:

ITEM	1981-2	1981-3	1981-4	1982-1	1982-2
1. Average Adjusted Hours Worked Per Week	33.57	33.57	33.57	33.57	33.57
2. Hourly Rate of Pay	¹ \$3.45	3.50	3.50	3.89	3.89
					² 3.50
3. Number of Weeks in Quarter Discriminatee Was Available for Work	5	13	8	6	9
4. Calendar Quarter Gross Backpay (Item 1 times Item 2 times Item 3)	\$585.80	1,527.44	939.96	783.52	1,175.29
5. Calendar Quarter Interim Earnings	0	0	0	0	0
6. Calendar Quarter Expenses	0	0	0	0	0
7. Calendar Quarter Net Interim Earnings (Item 5 minus Item 6)	0	0	0	0	0
8. Calendar Quarter Net Backpay (Item 4 minus Item 7)	\$585.80	1,527.44	939.96	783.52	1,175.29
TOTAL NET BACKPAY DUE DISCRIMINATEE JOHNSON: \$5,012.01					
(Sum of Item 8 for each calendar quarter)					

¹ Through 5/30/82.

² Effective 5/31/82.

As alleged in the Backpay Specification, the computation of Theresa Mueller's gross and net backpay by calendar quarter is as follows:

ITEM	1981-2	1981-3	1981-4	1982-1	1982-2
1. Average Adjusted Hours Worked Per Week	37.88	37.88	37.88	37.88	37.88
2. Hourly Rate of Pay	\$3.45	¹ 3.45	³ 3.50	⁶ 3.80	
				² 3.50	
				⁴ 3.70	
				⁷ 3.89	
				⁵ 3.80	
3. Number of Weeks in Quarter Discriminatee Was Available for Work	5	13	7	13	0
4. Calendar Quarter Gross Backpay (Item 1 times Item 2 times Item 3)	\$653.43	1,698.92	926.17	1,833.39	0
5. Calendar Quarter Interim Earnings	0	345.15	969.96	0	0
6. Calendar Quarter Expenses	0	5.00	0	0	0
7. Calendar Quarter Net Interim Earnings (Item 5 minus Item 6)	0	340.15	969.96	0	0
8. Calendar Quarter Net Backpay (Item 4 minus Item 7)	\$653.43	1,358.77	0	1,833.39	0
TOTAL NET BACKPAY DUE DISCRIMINATEE THERESA MUELLER: \$3,845.59					
(Sum of Item 8 for each calendar quarter)					

¹ Thru October 3, 1981.

² Effective October 4, 1981.

³ Thru January 9, 1982.

⁴ January 10, 1982, to February 6, 1982.

⁵ Effective February 7, 1982.

⁶ Thru April 3, 1982.

⁷ Effective April 4, 1982.

Upon this record, therefore, I find that counsel for the General Counsel has met its burden of establishing that the amount of backpay owed by the Respondent to Shirley Johnson is \$5,012.01 and to Theresa Mueller \$3,845.59. The Respondent has failed to meet its burden of establishing facts which would mitigate its liability.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby issue the following recommended:

ORDER¹

The Respondent, Calvin D. Johnson Nursing Home, shall satisfy its obligation to make whole Shirley Johnson for backpay due her for the period from May 22, 1981, through May 27, 1982, by paying her net backpay in the amount of \$5,012.01, plus interest thereon accrued to

¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

date of payment, computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),² minus any tax withholding required by Federal or state law. The Respondent shall satisfy its obligation to make whole Theresa Mueller for backpay due her for the period from May 22, 1981, through May 24, 1982, by paying her net backpay in the amount of \$3,845.59, plus interest thereon accrued to date of payment, computed in the manner prescribed in *Florida Steel* above, minus any tax withholding required by Federal or state law.

² See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).